



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 20, 2023

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BOARD DECISIONS

Appellant: Cathy Covington
Agency: Department of the Interior
Decision Number: [2023 MSPB 5](#)
Docket Number: DE-0752-15-0169-I-1
Issuance Date: January 13, 2023

Whistleblower Protection Act

The agency removed the appellant from her position as a Forester with the Bureau of Indian Affairs, Navajo Region, based on a charge of failure to safeguard Government records. She appealed her removal to the Board and alleged, among other affirmative defenses, reprisal for whistleblowing. The administrative judge affirmed the removal action. Regarding the appellant's claim of whistleblower reprisal, the administrative judge found that disclosures made by the appellant on December 5, 2013, and September 11, 2014, were not protected because the appellant had disclosed purported wrongdoing by the Navajo Nation, rather than the Federal Government. He found, however, that the appellant had engaged in protected activity because she had filed complaints with both the agency's Office of the Inspector General (OIG) and the Office of Special Counsel (OSC). The administrative judge concluded that the appellant proved that this protected activity was a contributing factor in

her removal; however, he found that the agency showed by clear and convincing evidence that it would have removed her absent this activity. The appellant filed a petition for review with the Board.

Holding: A disclosure of wrongdoing committed by a non-Federal Government entity is protected only when the Government's interests and good name are implicated in the alleged wrongdoing.

1. The Board explained that in prior decisions, including *Arauz v. Department of Justice*, 89 M.S.P.R. 529 (2001), it had found that a disclosure of wrongdoing committed by a non-Federal Government entity may be protected only when the Government's interests and good name are implicated in the alleged wrongdoing, and the employee shows that she reasonably believed that the information she disclosed evidenced that wrongdoing.
2. The Board explained that, in the absence of any higher authority rejecting this finding, it would not revisit the same.

Holding: The appellant's disclosures regarding alleged wrongdoing by the Navajo Nation Forestry Department implicated the Federal Government's interests and good name.

1. The Board found that the appellant's December 5, 2013 disclosures, which questioned harvesting activities and suggested that the Navajo Nation Forestry Department had a conflict of interest in benefitting from these activities, implicated the Federal Government's interests and good name because the disclosures implicated the agency's reputation in its oversight of Indian resources and land. In so finding, the Board reasoned that the Federal Government, acting through the agency, generally manages and has pervasive control over Indian timber, land, and forests on reservation land, which creates a trust relationship and resulting fiduciary obligation on the part of the Government toward the Indian people.
2. The Board found that the appellant's September 11, 2014 disclosure, which raised concerns that certain Navajo Nation-proposed tree harvesting projects did not comply with the National Environmental Policy Act (NEPA) and other Federal laws, implicated the Federal Government's interests and good name. In so finding, the Board reasoned that the agency is responsible for ensuring that management activities on Indian forest lands are NEPA compliant.
3. Accordingly, the Board concluded that the administrative judge erred in finding that the appellant's disclosures concerned only the Navajo Nation.

Holding: The appellant showed that her December 5, 2013 disclosures were both protected and a contributing factor in the agency's decision to remove her; however, her September 11, 2014 disclosure was not protected.

1. The Board found that the appellant reasonably believed that her December 5, 2013 disclosures evidenced wrongdoing under 5 U.S.C. § 2302(b)(8), and, therefore, that these disclosures were protected.
2. The Board concluded, however, that the appellant failed to show that she reasonably believed that her September 11, 2014 disclosure evidenced a violation of NEPA. The Board explained that the appellant had neither claimed, nor provided evidence showing, that she reasonably believed that a NEPA violation was real and imminent; rather, she merely referenced a proposed tree harvesting project that was under consideration, as opposed to activity that was already taking place or imminently about to occur. Accordingly, the Board found that the appellant's September 11, 2014 disclosure was not protected.
3. The Board thereafter concluded that the appellant showed via the knowledge/timing test that her December 5, 2013 disclosures contributed to the agency's removal action.
4. The Board remanded the matter, instructing the administrative judge to conduct a new analysis of whether the agency met its burden of proving by clear and convincing evidence that it would have removed the appellant in the absence of the totality of her protected disclosures and activities, i.e., her December 2013 protected disclosures and her OIG and OSC complaints.

Holding: The appellant failed to show that the agency engaged in witness intimidation during the hearing.

1. The Board acknowledged the appellant's contention that she felt intimidated by the presence of an agency human resources employee at the hearing.
2. The Board explained that, to find that an agency official intimidated a witness, an appellant must present evidence showing that the official threatened the witness with adverse consequences, such as disciplinary action, or suggested that the witness not testify or not testify truthfully. The Board concluded that the appellant had failed to make such a showing.

COURT DECISIONS

NONPRECEDENTIAL:

Cunningham v. Merit Systems Protection Board, No. [2022-2088](#) (Fed. Cir. Jan. 13, 2023) (DC-315H-17-0167-I-1) The court found that the Board properly dismissed Mr. Cunningham’s probationary termination appeal for lack of jurisdiction. The court reasoned that Mr. Cunningham, who was serving a 1-year probationary period in a competitive service position at the time of his removal, did not meet the definition of “employee” under 5 U.S.C. § 7511(a)(1)(A). Additionally, he had not alleged discrimination based on partisan affiliation or marital status, or that his termination was not effected in accordance with the procedural requirements of 5 C.F.R. § 315.805.

Davis v. Office of Personnel Management, No. [2022-1103](#) (Fed. Cir. Jan. 13, 2023) (PH-0843-20-0218-I-1) The court concluded that the Board had correctly found that Ms. Davis was not entitled to lump-sum death benefits under the Federal Employees’ Retirement System following the death of her cousin, a former Federal employee, because her cousin had not signed the Designation of Beneficiary Form that named Ms. Davis as beneficiary. The court agreed with the Board’s determination that the doctrine of substantial compliance is inapplicable to 5 U.S.C. § 8424(d), which requires that a beneficiary designation be signed.

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